Peter H. Sand, ***Atoll Diego Garcia: Naturschutz zwischen Menschenrecht und Machtpolitik***. Munich: Herbert Utz Verlag, 2011. Pp. 248. €47. ISBN: 9783831640553.

There are many ways of looking at the international system, but two dichotomies stand out: there are those who believe international behaviour is primarily motivated by systemic forces and those who believe that the internal composition of the individual units dramatically affects how they act internationally, and especially that democratic polities are more peaceful and law-abiding than others. Like many essentially untestable hypotheses, the debate between these two positions has resisted a clear resolution. One of the reasons the debate has been so vicious and largely unproductive lies in its implicit reliance on the other, even less testable dichotomy in international affairs, viz. the disputed nature of man as primarily good or primarily evil,[1] which is closely linked to the legal debate about the sources of obedience to law.[2]

International law as a discipline usually does not engage in speculation about the nature of the international system. It does, nevertheless, rest on the strong, if implicit, assumption that law has a system-defining existence and that states will obey it. To be sure, this belief is not necessarily utopian but can be empirically verified as fairly accurate,[3] for, as Henkin famously observed, 'almost all nations observe almost all principles of international law and almost all of their obligations

[1] Still the best exposition of both dichotomies can be found in K.N. Waltz, *Man, the State, and War: A Theoretical Analysis* (1959).

[2] See, for instance, H. McCoubrey, *The Obligation to Obey in Legal Theory* (1997).

[3] See, for instance, Koh, 'Why Do Nations Obey International Law?', 106 *Yale LJ* (1997) 2599; Posner, 'Some Economics of International Law', 31 *J Legal Stud* (2002) 321.

almost all of the time'.[4] But what when they don't? More damaging still, what if the law-breaker is doing so persistently, with alacrity and great intellectual, if not criminal, creativity and energy, all the while maintaining a professed reverence for legality?[5] Such persistent violation under the legalistic cover of 'plausible deniability' will negatively affect the integrity of international law, and the present book is the somewhat disillusioning account of that negative impact.

For those not familiar with the events, the sorry story is quickly told:[6] worried about the impact of impending decolonization, the United States searched in the 1960s for global military bases that would remain immune to the unpredictable leanings of local governments. A number of atolls in the Indian Ocean offered a very advantageous strategic location and were thus detached from the existing British colonies of the Seychelles and Mauritius to form the so-called British Indian Ocean Territory (BIOT). In order to avoid the obligations resulting from Articles 73 and 74 UN Charter and maintain maximum freedom of action from potential future local interference, the United States and the United Kingdom colluded to have the existing population forcefully evicted and literally dumped into destitution on the shores of Mauritius and the Seychelles. Subsequently, an ever growing military base was erected on Diego Garcia which today is one of the two or three most important military bases of any power in the world.

So far, so bad. But what makes the story so interesting, if depressing from an international law point of view is the extreme degree of collusion between these major Western powers with the explicit aim of circumventing legal obligations that were fully, if confidentially, acknowledged. Academically fascinating is the sudden availability of hitherto secret internal and bilateral documentation, released primarily in the course of litigation brought by the displaced Chagossian people against the US and, especially, the UK government. Further documents were recently obtained through Wikileaks. It is especially laudable that the present book collates much of this material in an exhaustive annex of primary documentation (at 137–223).

Apart from the obvious importance of the case for students of international law, there are important lessons to be drawn for students of constitutional law and those interested in the independence of the judiciary. The long litigation history in the United States and the United Kingdom shows a surprising readiness of the judiciary in these two countries to abscond themselves from their duty of control over executive action. The action brought by representatives of the dispossessed Chagossians in the US[7] was summarily dismissed with reference to the peculiarly extensive US interpretation of executive prerogative in foreign and security policy.[8] The dangers of excessive reliance on this questionable doctrine have been exhaustively discussed

[4] L. Henkin, *How Nations Behave. Law and Foreign Policy* (2nd edn, 1979), at 47, emphasis omitted.

[5] These points were criticized by the judges who delivered the two HC and one CA judgments: *The Queen v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Bancoult* [2000] QB 1067, [2000] EWHC Admin 413; *The Queen (on the Application of Olivier Louis Bancoult) v. The Secretary of State for Foreign and Commonwealth Affairs* [2006] EWHC 1038 (Admin); *Secretary of State for the Foreign and Commonwealth Affairs v. The Queen (on the application of Bancoult)* [2007] EWCA Civ 498.

[6] For a concise summary of the islands' history see Afsah, 'Diego Garcia (British Indian Ocean Territory)', in R. Wolfrum (ed.), *Encyclopedia of Public International Law* (2009).

[7] *Olivier Bancoult et al. v. Robert McNamara et al.*, US Dist Ct for DC, 370 F Supp 2d 1 (2004); *Olivier Bancoult et al. v. Robert McNamara et al.*, US CA for DC, 445 F 3d 427 (2006); *Olivier Bancoult et al. v. Robert McNamara et al.*, US Sup Ct, cert. denied 127 S Ct 1125 (2007).

[8] 'For this reason, the claims against the individual Appellees are barred by the same separation of powers concerns that prevent the court from examining the claims against the United States. Examining these claims would require the court to judge the validity and wisdom of the executive's foreign policy decisions, as Appellees' acts were inextricably part of those policy decisions. This rationale does not entail some new form of immunity for executive officers who take actions in pursuit of foreign policy or national security goals; we merely hold that when the political question doctrine bars suit against the United States, this constitutional constraint cannot be circumvented merely by bringing claims against the

in the context of the utter failure of the US judiciary to rein in the continuing detainee abuse by US forces.[9]

In the UK, the litigation history presents a more complex picture. In the course of the first case before the High Court in 2000, the British government lost, formally admitted illegal wrongdoing by previous governments, and solemnly vowed to redress these earlier injustices by foregoing a possible appeal and to repeal offending legislation that had hitherto prevented the return of the expelled population to its homeland.[10] Due to considerable US pressure on alleged 'security' concerns, however, the British government subsequently rescinded the measures it had taken as a result of the High Court's judgment, leading to renewed legal action by the islanders. In the course of this new litigation, the High Court severely criticized the executive for its transparent attempt to invalidate the earlier binding judgment by means of an atavistic 'Order in Council'.[11] This reasoning was upheld in no uncertain terms by the Court of Appeal.[12]

The House of Lords, however, chose to overturn these previous judgments and adopt an executive exception doctrine not dissimilar to that of the US courts, albeit with a historical gloss absent in US doctrine. The Lords confirmed the continued validity of 'prerogative colonial law' and dismissed the plaintiffs' protection by either Magna Carta or the European Convention on Human Rights throughout the British colonial possessions.[13]

This decision shows a somewhat creative application of British constitutional law and a startling disregard for the UK's legal obligation under international and European law.[14] The Lords' willingness completely to remove executive acts in the colonies from any form of judicial oversight through mere reference to archaic legal instruments[15] shows that the creation of 'legal black holes' is by no means an exclusively American practice and that complacency about the supposedly more robust nature of European judicial protections in the realm of national security is ill-advised.[16]

Sand's exhaustive annex includes the majority opinion delivered by Lord Hoffmann which summarizes the verdict's startling logic, in particular the Lords' view of international law as utterly irrelevant.[17] Likewise noteworthy is their somewhat troubling interpretation of British

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individuals who committed the acts in question within the scope of their employment. Hence, we conclude that all the claims in this case present nonjusticiable political questions': *Bancoult*, US CA, *supra* note 7, at paras 41–43.

9 Ohlin, 'The Torture Lawyers', 5 *Harvard Int'l LJ* (2010) 1.

10 *The Queen v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Bancoult* [2000] QB 1067, *supra* note 5.

11 'The suggestion that a minister can, through the means of an Order in Council, exile a whole population from a British Overseas Territory and claim that he is doing so for the "peace, order and good government" of the territory is, to us, repugnant': *The Queen on the Application of Olivier Louis Bancoult v. The Secretary of State for Foreign and Commonwealth Affairs*, *supra* note 5, at para. 142.

12 *Secretary of State for Foreign and Commonwealth Affairs v. The Queen (on the application of Bancoult)*, *supra* note 5.

13 *R (on the Application of Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, 4 All ER 1055 (2008).

14 Sands, 'Comment', 103 *Am J Int'l L* (2009) 317; Allen, 'International Law and the Resettlement of the (Outer) Chagos Islands', 8 *Human Rts L Rev* (2008) 683.

15 Here, Royal Orders in Council and the Colonial Laws Validity Act 1865

16 Lord Steyn's widely read article which justly criticized the US judicial system for being overly accommodating to expansive notions of executive privilege seemed at times to imply that things were somewhat different in Europe: see Steyn, 'Guantanamo Bay: The Legal Black Hole', 53 *Int'l & Comp LQ* (2004) 1.

17 'As for international law, I do not understand how, consistently with the well-established doctrine that it does not form part of domestic law, it can support any argument for the invalidity of a purely domestic law such as the [BIOT] Constitutional Order': Lord Hoffmann for the majority, *The Queen (on the application of Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No. 3)*, *supra* note 13, at para. 66.

constitutional law (at 118), especially the extremely limited role that the Lords attributed to the judiciary with respect to political decisions of the executive branch which they deemed to be generally 'non-justiciable'.[18]

In its entirety, the judicial record of this ongoing litigation is a healthy reminder of the uneasy co-existence of law and power, and of the persistence of colonial domination in the present legal order.[19] Sand offers here a necessary introductory background to this sordid tale about the limits of law, both international and constitutional. Next to David Vine's seminal study of the plight of the people of Diego Garcia,[20] which he complements extremely well, Sand has produced an almost encyclopaedic account of the expulsion of these people from their tropical homeland and the diplomatic and legal cover-up undertaken by the United States and the United Kingdom ever since. Where Vine provides an excellent and nuanced sociological and historical overview of the motivation of the various actors, Sand provides a much needed legal complement.

Sand's study is easily the most accessible and comprehensive exposition of the legal issues involved in the Diego Garcia litigation, such as the dispossession of indigenous peoples, the relative weight of environmental protection and human rights, the implications of nuclear weapons free zones, and, certainly not least, the ongoing sovereignty dispute between Mauritius and the UK, as well as covering the important military and international humanitarian law issues. An environmental lawyer by trade, he emphasizes the role of international environmental law and its duplicitous use in recent years by the UK government to justify the continued dispossession of the islanders (at 119–122). This is a particularly instructive aspect of the book, given the overwhelmingly positive role generally attributed to environmental protection. Sand convincingly shows that both the US and UK governments have used the instrument of unilaterally proclaimed 'Marine Protected Areas' or 'Marine National Monuments' to protect not nature, but their respective military activities, from intrusion and oversight. In the present case, both governments have also explicitly and concertedly sought to ally themselves with environmental NGOs in order to brand the potential return of the islanders as an unacceptable risk to the area's unique ecosystem. The duplicitous nature of such arguments is apparent well before one considers the contradiction inherent in labelling a few hundred islanders relying on a subsistence economy a greater environmental threat than several thousand sailors and airmen operating several hundred sea and air vessels in some of the highest-traffic military bases of the world.

Given its exceptionally comprehensive referencing, the book will offer students of many diverse subfields of international law a good point of departure for further exploration, helped by the good index and the already mentioned documentary annex. The book is the updated German translation of an earlier English version,[21] with the discussion of the recent House of Lords' judgment and the role of environmental law being the primary additions to the new edition. The present work, like Vine's previous study, does not aspire to a neutral rendering of the issue and does not hide its sympathy with the dispossessed islanders. Sand's account is exhaustive in scope, persuasively argued, and through its collation of original reference material a commendable tool for academic instruction.

[18] *Ibid.*, at para. 58, Lord Rodger of Earlsferry at para. 109 and Lord Carswell at para. 130, concurring. For a critical discussion see Tomkins, 'National Security and the Role of the Court: A Changed Landscape?', 126 *LQR* (2010) 543, at 547.

[19] See here the comprehensive accounts by A. Anghie, *Imperialism, Sovereignty, and the Making of International Law* (2005); and Anand, 'Family of "Civilised" States and Japan: A Story of Humiliation, Assimilation, Defiance and Confrontation', 5 *J History of Int'l L* (2003) 1.

[20] D. Vine, *Island of Shame. The Secret History of the U.S. Military Base on Diego Garcia* (2009); Afsah, 'Vine, David: Islands of Shame: The Secret History of the U.S. Military Base on Diego Garcia (Review Article)', 21 *EJIL* (2010) 257.

[21] P.H. Sand, *United States and Britain in Diego Garcia: The Future of a Controversial Base* (2009).

In summary, the ongoing legal odyssey of Diego Garcia provides an illustrative case for the limits of law and thus offers a healthy sceptical antidote to the optimism with which international lawyers, perhaps necessarily, usually approach their discipline. If one looks at this issue through the epistemological lens of realism, the enormous military importance of the base provides an easy explanation for the actions of these two powerful Western states. From that disciplinary perspective, their failure to respect binding international law and the attendant failure to find adequate legal redress in judicial fora is hardly surprising. Students of law, however, cannot but be disillusioned by the seeming inconsequentiality of legal norms in this case, both international and constitutional.

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